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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 104–111) is reported at 234 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (R. 112). A petition for rehearing was denied on June 22, 1956 (R. 112–113). The petition for a writ of certiorari was filed on July 18, 1956, and was granted on October 8, 1956 (R. 113). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was sub-

poenaed to appear before a grand jury which was investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, said he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts. The District Court ruled, after a hearing in which petitioner attempted to justify his claim of privilege, that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court summarily cited him for contempt under the authority of 18 U. S. C. 401 (3) and the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure. The questions presented are:

1. Whether the District Court properly held that the privilege against self-incrimination did not attach to questions relating to the whereabouts of the books and records of the union of which petitioner was secretary-treasurer.

2. Whether, in these circumstances, petitioner was afforded an adequate hearing and an opportunity to justify his refusal to answer the questions asked him by the court.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

> (a) *Summary Disposition.*—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.*—A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or

criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, Judge Gregory F. Noonan cited petitioner for contempt of court, under the authority of 18 U. S. C. 401 (3) and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3), for refusing to answer certain questions in the court's presence. Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (R. 41–42).

This contempt citation grew out of the following circumstances:

On April 10, 1956, in answer to a subpoena to appear before a grand jury in the Southern District of New York and testify to all he knew with regard to an alleged violation of the federal conspiracy statute, 18 U. S. C. 371 (R. 47), petitioner appeared but declined to answer certain questions until he had consulted his attorney (R. 61–66). He was excused and ordered to return on April 12, 1956, with the books and records of Local 269 of the International Brotherhood of Teamsters which had been demanded in the subpoena duces tecum (R. 48–50), already served on him in his official capacity as secretary-treasurer of the union (R. 66).

On April 12, 1956, petitioner appeared with three persons, two of them attorneys (R. 67, 96), who stayed in an anteroom while petitioner testified before the grand jury, and with whom petitioner consulted frequently, with the permission of the grand jury foreman.[1] Petitioner stated that he was the Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (R. 68); that the union had books and records to his knowledge (R. 75); that he had

[1] Petitioner consulted his attorney when asked the following questions:

"In whose possession are those records?" (R. 67–68). After consultation, petitioner declined to answer on the ground that it might incriminate him (R. 68).

"You've been an officer of other labor unions?" (R. 68). After consultation, petitioner replied that he had (R. 69).

"In your experience as a labor union officer, would you say that it's usually the function of the secretary-treasurer of a local to maintain custody of the books and records of the local?" (R. 69–71). After consultation, petitioner declined to answer on the ground of incrimination (R. 71).

"Did you, of this other labor union, have custody of the books and records?" (R. 72–73). After consultation, petitioner claimed privilege (R. 72–73). After the foreman directed petitioner to answer this question, he again consulted his attorney for four minutes (R. 73–74) and then answered that he did (R. 74).

"Referring to Local 269 of the International Brotherhood of Teamsters, to your knowledge are there any books and records of this local?" (R. 74). After a consultation of four minutes, petitioner replied that there were (R. 75).

"To your knowledge where were the records of Local 269 a week ago today?" (R. 79). After consultation for five minutes, petitioner claimed the privilege (R. 79).

"Mr. Curcio, do you know a James Hoffa who is Vice-President of the International Brotherhood of Teamsters?" (R. 89). After consultation, petitioner claimed the privilege (R. 89).

"What printer did you order those letterheads from?" (R. 92). After consultation, for over five minutes, petitioner answered the question (R. 92).

seen them (R. 84–85); but that they were not in his possession (R. 76). He refused, on the ground of self-incrimination, to state what kind of books they were (R. 76–77); whether he ever had custody of the books (R. 77); where the records were at specific times (R. 79–80, 86–87); whether John DioGuardia had ordered him not to produce the books (R. 84); and who had possession of the records at that time (R. 87). He was warned that refusal to answer proper questions would constitute contempt (R. 87). He was then excused with instructions to return on April 17, 1956 (R. 96).

On April 17, 1956, petitioner, accompanied by his attorney (Mr. Arnold Cohen) who had also accompanied him on April 12 to the grand jury hearing, reappeared before the grand jury and declined, again on the ground of self-incrimination, to answer any of the following questions, which were a portion of the questions which had been asked at the April 12 hearing (R. 96–102).

> I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?
>
> * * * * *
>
> Mr. Curcio, have you ever had possession of the books and records of this local?
>
> * * * * *
>
> Did you have custody and control of these records last Thursday?
>
> * * * * *

Do you have possession of those records or any of them today?

* * * * *

Do you have custody and control of any of these records today?

* * * * *

Where are any of those records today, if you know?

* * * * *

Who has any of those records today, if you know?

* * * * *

Where were any of these records or all of these records a week ago Thursday?

* * * * *

Where were any or all of these records a week ago Saturday?

* * * * *

Where were any or all of these records a week ago yesterday, Monday?

* * * * *

Where were any or all of these records this past Thursday?

* * * * *

Where are any or all of these records today?

* * * * *

Who, if you know, had any or all of these records a week ago Saturday?

* * * * *

Who had any or all of these records a week ago yesterday?

* * * * *

Who has any or all of these records today?

* * * * *

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The grand jury recessed and reconvened later the same day before District Judge Noonan, at which time petitioner was asked the same questions he had previously refused to answer that morning, was directed by the foreman of the grand jury to answer them, and declined to do so on the ground of self-incrimination (R. 3–9). Petitioner's counsel asked for and was denied a transcript of the grand jury testimony (R. 4–5). The Assistant United States Attorney gave Judge Noonan the background of petitioner's refusal and Judge Noonan then asked petitioner's attorney, Mr. Cohen, how the answering of these questions posed on April 17 would incriminate petitioner (R. 10). Mr. Cohen gave the following explanation (R. 10–11):

> The witness, I have been informed, did at one time answer questions that he did not have possession of the books and records. That certainly takes care of the subpoena duces tecum which was served upon him. Any other question relating to "Did you ever have possession" or "Do you know who has possession" I feel that his privilege goes to these questions and answers, because the nature of the investigation before the Grand Jury, if we are to try to get our information from the press, is to investigate racketeering in trucking and food local unions.
>
> In addition to that, we have here a civil action which is now being litigated, I think, on the 15th floor of this court.
>
> Insofar as the nature or purpose of any investigation by the Grand Jury relating to those questions, the defendant in many ways could

> be tied in, not being able to find out or determine or not being permitted to find out or determine the nature of the investigation in question, and he has the right, if in his mind he believes that the answer might incriminate him, to assert the Fifth Amendment to protect himself. I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

After the court stated that the showing was insufficient to support the claim of privilege (R. 13), Mr. Cohen explained further (R. 14):

> I believe that to some extent the investigation, as far as I have been informed by my client, by the jury, is going into the internal affairs of a labor organization. I believe if there is any suspicion, proof or reason to believe that any labor organization or any official of any labor organization has committed any crime, they should be vigorously prosecuted. But I also feel that the United States Attorney's office should not be used to go into the internal affairs of a labor organization and to ask questions that are not material or relevant to the purposes of convenience of this noble and honorable Grand Jury for the purpose of possibly establishing something which is the subject of litigation in another part of this building.

The court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the grand jury room and answer

the questions just put to him before the court (R. 15). Neither petitioner nor his counsel asked for additional time to produce witnesses or documents in support of the claim of privilege.

Two days later, on April 19, 1956, petitioner appeared before the grand jury and declined to answer the questions he had been directed to answer by the court on April 17 (R. 18–19). He was then brought before Judge Noonan again, and, in the presence of the grand jury, Judge Noonan asked him the same questions he had previously been directed to answer. Petitioner declined to answer on the ground of self-incrimination (R. 26–28). His counsel sought to obtain another hearing so that he could prepare a defense and could produce witnesses and documents in support of the claim of privilege, although he did not explain what he hoped to prove. He again asked for transcripts of the grand jury testimony (R. 20–21, 26, 30–31). The court ruled that since the contempt was committed in its presence a hearing was not necessary; but he did permit petitioner's counsel another opportunity to support the claim of privilege (R. 31). Petitioner's counsel stated (R. 32–33):

> I say that this investigation might lead to a conspiracy indictment; that the questions that are being asked might, in some way, be connected with or be part of or used for the conspiracy indictment. Having that in mind, in good faith, even though it might be an erroneous assumption of privilege, it is not contempt because certainly with the avenue of investigation today, we have to examine the atmosphere that we are living in, not only the jurisdiction

> of the federal but also the jurisdiction of the state, and there is certainly sufficient ground to believe that conspiracy might lie from the line of questions that are being asked. If that is in the witness's mind, as I know it is in the witness's mind, I say that he is properly exercising his constitutional guarantee under the Fifth Amendment not to answer these questions on the ground that the answers might incriminate him.

When the court said it did not see how these answers could incriminate petitioner in a conspiracy, petitioner's counsel offered to explain in the absence of the grand jury, but in the presence of the Assistant United States Attorney (R. 35). The court declined this suggestion and ruled petitioner in contempt (R. 35).

On appeal, petitioner submitted, as part of the appendix to his brief in the Court of Appeals, newspaper clippings relating to civil litigation, over an election to the presidency of the Teamsters Joint Counsel, between Martin T. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were connected with gangsters and racketeers; describing a so-called drive against city rackets by federal and local prosecutors; and naming one Johnny DioGuardia, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to discover (R. 51–60). Considering petitioner's claim in the setting of what these clippings revealed, the Court of Appeals could find nothing that justified his assertion of the privilege against self-incrimination in answering

questions pertaining to the books and records of the union of which he was admittedly an official (R. 107, 110–111). The Court of Appeals also held that petitioner had a fair hearing prior to the judge's ruling on the claim of privilege and was entitled to no further hearing under Rule 42 (a), which is applicable when a contempt is committed in the actual presence of the court as it was here (R. 108–110). No error was found in the denial of the transcript of petitioner's grand jury testimony on April 12. The court noted that petitioner, at the hearing on the claim of privilege, intimated nothing about his testimony before the grand jury having a bearing on his refusals to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given and, therefore, it was reasonable to suppose that his counsel could have directed the District Court's attention to any part of the testimony which might have supported the claim of privilege (R. 109–110).

SUMMARY OF ARGUMENT

I

The basic issue which was before the District Court and is now here is a legal one—whether the custodian of the records of a union may refuse, on the ground of his personal privilege against self-incrimination, to answer questions as to the whereabouts of the association's books which have not been produced pursuant to subpoena. We make no claim that, if petitioner's personal privilege did apply to questions concerning

the union records, he failed to make an adequate showing of possible incrimination.

A. On the fundamental issue, it is the government's position that, since it is established that the custodian of an association's books may not refuse to produce them even if they would incriminate him personally (*United States* v. *White*, 322 U. S. 694, 699), the custodian's personal privilege also does not attach to his duty as custodian to explain the nonproduction of the books. The duty to account for books which have not been produced by the organization is not personal to the custodian, but arises by virtue of his office. Since petitioner, as custodian, was obliged to produce the books, regardless of their incriminatory character, he must also, as custodian, explain their nonproduction even if such explanation would incriminate him.

This Court has recognized that the power of governmental inquiry into organizational activities is dependent on a correlative power to compel the cooperation of its officers. See *United States* v. *Fleischman*, 339 U. S. 349, holding that each member of a joint board was bound to act with others to bring about compliance with an order. Similarly here, the right of the government to compel production demands the correlative power to require explanation of nonproduction. The power to compel production of nonprivileged records would be largely illusory if the custodian of unprivileged organization records could escape his responsibility by the simple expedient of passing the records from one person to another without explanation. The public character of the records would become more theoretical than real.

It is of course never possible wholly to separate an entity from the individual who acts for the entity. The problem is basically which aspect of the dual function of the custodian will be given more weight, the individual or the representative. Since, as to organization books, this Court has held the representative capacity to be controlling, that factor must govern as to questions relating to books which should have but have not been produced by the organization. The possibility that disclosure of the whereabouts of the books would reveal an obstruction of justice—*e. g.*, by destruction of the books—does not serve to change the representative character of the custodian's duty to account for the books. A custodian who has no privilege with respect to the books ought not to be allowed to bring himself within the protection of the privilege by violating his plain duty to produce.

We may point out that the alternative to a holding that the privilege does not attach to questions concerning the whereabouts of organization books would be a proceeding for contempt for failure to produce in itself. In such a proceeding, the mere fact of nonproduction would, in the normal case like this one, establish a *prima facie* case of willful disobedience; it would be the custodian's burden to explain nonproduction. He could not shield himself behind the privilege as the reason for his refusal to explain and still expect to escape the consequences that would flow from such a failure to explain. But we suggest that such a proceeding is not a desirable alternative. The purpose of an investigatory body is to get the records, not to put people in jail. It would be more desirable,

as to unprivileged organization books, to lay stress on the representative duty of the custodian to account for the books, rather than on punishment for failure to produce.

B. The lower federal courts have regularly held that the personal privilege of the custodian does not attach to questions concerning an organization's books. *E. g., United States* v. *Field,* 193 F. 2d 92, 109 (C. A. 2), certiorari denied, 342 U. S. 894.

II

Since the basic question before the District Court was the legal issue of whether petitioner's personal privilege attached to questions concerning the location of the unproduced union books, the procedure followed in that court was wholly adequate to accord petitioner due process. The fifteen questions selected, all relating to the whereabouts of the books, raised only that one issue. No other questions put to petitioner before the grand jury could have had any bearing on that legal issue since the other questions did not relate to petitioner's duty in his representative, as distinguished from his personal, capacity. Hence, the production of the grand jury transcript could have no relevance on the narrow issue involved in this contempt proceeding. Similarly, we do not claim that petitioner made an inadequate showing of incrimination *if he had a personal privilege.* The issue was whether he had such a privilege; a more extended hearing on the possibility of incrimination could have no relevance to that problem.

On the narrow legal issue, petitioner had ample time to marshal whatever legal arguments he wished

to make. On April 12, he had been warned that his refusal to answer would constitute contempt. On April 17, the judge ruled that he could not claim the privilege with respect to questions concerning the books. The proceeding on April 19, when the court itself asked the questions and petitioner refused to answer, was merely the carrying out of the judge's previous ruling of law. The refusal to answer in the presence of the court, in defiance of the judge's ruling, was the means by which petitioner obtained a final judgment which enabled him to obtain review of that legal ruling. The same procedure was followed in *Rogers* v. *United States,* 340 U. S. 367, also involving a question of law, where this Court affirmed the conviction without discussing similar claims of inadequacies in the trial court procedure.

ARGUMENT

By concentrating on a mass of material which is not now pertinent to this proceeding, petitioner's brief obscures the controlling question. The basic issue before the District Court and now before this Court is a general legal one—whether the custodian of a union's records may refuse, on the ground of his personal privilege against self-incrimination, to answer questions as to the whereabouts of the union's books which he has not produced pursuant to subpoena. The fact that out of several hundred questions put to petitioner only fifteen, all relating to the whereabouts of the books, were made the subject of the contempt proceeding sharply defines the limits of the issue now involved; there is no issue whatever as

to any of the other questions asked petitioner. Nor do we claim that, if petitioner's personal privilege does apply to the questions concerning the union's records, he failed to make an adequate showing of possible incrimination. Our position simply is that the privilege does not apply at all in these circumstances.

For this reason, petitioner's brief, which discusses for the most part the possibility of incrimination and the opportunity to make a showing of incrimination, deals with matters which we deem irrelevant. As we view it, the decisive question in the case is whether petitioner had a privilege as to the fifteen questions concerning the whereabouts of the union's records which had not been produced. Our argument is that petitioner had no privilege with respect to such questions because he had no privilege with respect to the books themselves, however incriminating—that the duty to account for nonproduction of the books was as much a representative duty, to which the privilege does not apply, as the duty to produce the books pursuant to subpoena. That is the issue we discuss first. And we then show that as to that issue, which was the basic one before the District Court, petitioner had ample notice and opportunity to present any argument that he wished to make in defense of his refusal to answer.[2]

[2] In December 1956, the Government filed a Memorandum for the United States Respecting Possible Mootness, concerned with events subsequent to the granting of certiorari. We do not repeat the material contained in that Memorandum, but refer to it for the considerations affecting possible mootness.

I. The official custodian of a union's books and records cannot refuse, under a personal claim of privilege against self-incrimination, to answer questions as to their whereabouts.

A. The duty to account for union books which have not been produced is, like the duty to produce, that of the custodian in his representative capacity to which his personal privilege does not attach.

1. It was established by the decision of this Court in *United States* v. *White*, 322 U. S. 694, 699, that the custodian of the books and records of an unincorporated association, such as a labor union, cannot refuse to produce them pursuant to subpoena even though the records might tend to incriminate the custodian personally. *White* thus applied to the books and records of labor unions and other unincorporated organizations the principle long applied to the books and records of corporations which cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian. *Rogers* v. *United States*, 340 U. S. 367, 372; *United States* v. *Fleischman*, 339 U. S. 349, 358; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 205; *Essgee Co.* v. *United States*, 262 U. S. 151; *Grant* v. *United States*, 227 U. S. 74; *Wilson* v. *United States*, 221 U. S. 361. The Court in the *White* case explained the principle as follows (322 U. S. at pp. 699–700):

> * * * But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or associa-

> tion of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. * * * Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. See *Guthrie* v. *Harkness,* 199 U. S. 148, 153. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.
>
> * * * * *

2. It follows, we believe, that the person who would be the normal custodian of the organization's books cannot, on the basis of his personal claim of privilege, refuse to answer auxiliary questions with respect to the whereabouts of the books and records when he, as the representative who should have them, has failed to produce them as directed by the subpoena.

The organization which does not produce the records called for in a subpoena is under an affirmative duty to explain what happened to them. *United States* v. *Bryan,* 339 U. S. 323, 331; *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553; *United States* v. *Goldstein,* 105 F. 2d 150 (C. A. 2); *London Guarantee*

& Accident Co., Ltd. v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Pa.). And the Court has recognized that the power of governmental inquiry into organizational activities is dependent on a correlative power to compel the cooperation of its officers. In *United States* v. *Fleischman,* 339 U. S. 349, for instance, each of the officers of the Joint Anti-Fascist Refugee Committee disclaimed individual power to produce the organization's records since their disposition required common action by members of the executive board acting together. Applying the principle of *Wilson* v. *United States,* 221 U. S. 361, that "a command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs," *Fleischman* held that each officer, having accepted "an office of joint responsibility," necessarily assumed "an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order." 339 U. S. at pp. 356–357.[3]

Similarly, the obligation of the custodian to explain the nonproduction of the union's books is not personal to him but arises by virtue of his representative status as official custodian of the organization records and "is incident to the requirement to produce."

[3] See also *Wheeler* v. *United States,* 226 U. S. 478, and *Grant* v. *United States,* 227 U. S. 74, in which this Court refused to extend the privilege against self-incrimination on the plea of individuals who had claimed ownership of the books and records of a dissolved corporation, on the basis that such transfer had neither altered the character of the documents as quasi-public records nor the obligation of their custodian to produce them on reasonable demand.

Wilson v. *United States*, 221 U. S. 361, 374.[4] 'Since organizations can act only through individuals, the individual is of course the one before the court. But since the duty to explain is that of the organization, the personal privilege of the individual cannot be used as an excuse for nonperformance of the organization's duty. Both the duty to produce and the duty to explain the nonproduction fall within the rationale of the Court's opinion in *White* (322 U. S. at pp. 704–705):

> * * * Nor could respondent claim the privilege on behalf of himself as an officer of the union or as an individual. The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual. * * * The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

The same public responsibility which compels the custodian to produce the records also demands that he explain their whereabouts when they are not in his

[4] It is only when the questioning goes beyond a reasonable inquiry as to the whereabouts or identity of such unprivileged documents that the representative's personal privilege may be invoked. *United States* v. *Gordon*, 236 F. 2d 916 (C. A. 2); *United States* v. *Daisart Sportswear*, 169 F. 2d 856, 861–862 (C. A. 2), certiorari denied, 335 U. S. 884; and see *Grant* v. *United States*, 227 U. S. 74. See also fn. 10, *infra*, p. 29.

physical possession at the time of demand. The custodian "has voluntarily assumed a duty which overrides his claim of privilege * * *." See *Shapiro* v. *United States,* 335 U. S. 1, 17.

Whether answers as to the whereabouts of the books would or would not implicate petitioner in the possible criminal activities of his union (Pet. Br. 37–43) has no more relevance to his duty as custodian to account for nonproduction than it had to the duty to produce involved in *United States* v. *White, supra.* There, as we have shown, the Court held that the personal privilege of the custodian does not justify the nonproduction of union books even though they are incriminating as to him. Obviously, if the books and records of a union contain information which tends to incriminate the custodian, answers to questions relating to the whereabouts of these documents may also tend to incriminate since they will lead to production of the evidence needed to support a prosecution against him. But since the personal privilege of the official custodian does not entitle him to insulate them from production, it cannot insulate them from disclosure of their location. Even where the very fact of custody, such as by an officer of the Communist Party, would carry the possibility of incrimination, this Court noted in *Rogers* v. *United States,* 340 U. S. 367, 372, that the personal claim of privilege "cannot be asserted in relation to the books and records sought by the grand jury * * *." See also fn. 11, *infra,* p. 30. And if the privilege does not attach to the books, no matter how incriminating the fact of possession, it should not attach to questions concerning the loca-

tion of the books which are held, not as an individual, but as the representative of an organization.

It is of course never possible wholly to separate an entity from the individual who acts for it. Union books can and sometimes do incriminate the man who must produce them; the custodian of books of such an organization as that of the Communist Party is implicated to some degree by the mere fact of custody. This Court was well aware of that fact in the *Wilson, White* and *Rogers* line of decisions, *supra*, p. 18. The question is basically which aspect of the dual function of the custodian will be given more weight, the individual or the representative. The Court has settled that, as to the books of unions, associations, and corporations, the representative capacity is controlling. That factor must also govern as to questions relating to the whereabouts of books which are not produced by the normal custodian.[5]

3. To hold that the personal privilege can be invoked in these circumstances would be, as observed in *Fleischman* (339 U. S. at 357), to "remove such organizations beyond the reach of legislative and judicial commands." Such a rule would mean that the custodian could conceal in his role as a private

[5] Petitioner is thus clearly in error in suggesting (Pet. Br. 40–42) that the fifteen questions relating to the whereabouts of the union books and records cannot be treated as separate from the other questions put to him. Rather, the selection of those fifteen questions shows that the government was carefully distinguishing between petitioner's privilege as an individual and petitioner's lack of privilege as custodian of the union records. The whole basis of the contempt proceeding is the position that the privilege does not attach either to the records or to questions as to the whereabouts of the records.

citizen what he is bound to disclose as an officer, and would permit him to exchange his role as an officer for that of private citizen whenever the inquiry into the activities of his organization threatened to embarrass him. If, merely by passing the records on to another, the organization spokesman could discharge his further responsibility toward them, his duty to produce would be, as the court below said (R. 110), "no more than an empty and meaningless form of words." A subpoena would be "an invitation to a game of hare and hounds, in which the witness [in this case, the organization itself] must testify only if cornered at the end of the chase." *United States* v. *Bryan,* 339 U. S. 323, 331. The difficulties which would be engendered by such an extension of the privilege are illustrated by the facts of this very case where this petitioner, although secretary-treasurer of his union and therefore normal custodian of its records, at first disavowed possession of any of them and refused to answer questions as to their whereabouts, but later, after this case had reached this Court, was found to have them in his possession as a union officer. See the Memorandum for the United States Respecting Possible Mootness, pp. 2–3. Unprivileged records should not be rendered immune from governmental inquiry by the simple expedient of passing the records back and forth without any obligation of explanation. And if custodians of union books were privileged against questions of a grand jury seeking to discover the books' whereabouts, a similar rule would presumably be applicable where union members seek through civil process to compel

their officers to disclose records of official transactions which have been concealed from them. The public character of the books (see *United States* v. *White, supra* (322 U. S. at pp. 699–700); *Guthrie* v. *Harkness*, 199 U. S. 148, 153) could thus become more a theoretical concept than a reality.*

4. The special suggestion is made (Pet. Br. 42–43) that questions as to the whereabouts of the books should be subject to the personal claim of privilege because the custodian could be himself involved in the crime of obstruction of justice which might be the direct cause of the nonproduction. It is well to note, first, that this is a belated claim in this case. In the District Court, petitioner's position was that the questions seeking to locate the union's books and records tended to implicate him in a possible con-

* That was the actual result in the New York case of *Bradley* v. *O'Hare*, 2 App. Div. 2d 436, cited by petitioner (Pet. Br. 42). There, in a suit by an international union against officers of former local, charging misappropriation of the local's assets, the defendant was upheld in his refusal, on the basis of privilege, to answer questions as to whether he possessed the bank books and records of the local. The court held that, since the questions related to the very property which the defendant was accused of misappropriating, the mere admission of possession would in itself be incriminating and distinguished this Court's *White* decision on that ground. To the extent that the New York decision is based on the theory that the privilege may be asserted where mere admission of possession would be incriminating, it is contrary to the implications of *Rogers* v. *United States*, 340 U. S. 367, 371, in which this Court noted that an official of the Communist Party could claim no privilege to refuse to produce Party books (see the text, *supra*, at p. 22). The Court of Appeals of New York has held that a corporate officer who refuses to explain nonproduction must give a reasonable explanation or suffer the penalty for nonproduction. *Bleakley* v. *Schlesinger*, 294 N. Y. 312, 62 N. E. 2d 85.

spiracy since the grand jury was investigating (R. 11) "racketeering in trucking and food local unions," and that in any event the grand jury was not authorized (R. 14) "to go into the internal affairs of a labor organization * * *." Similarly, in the Court of Appeals the emphasis of petitioner's argument was on his possible implication in illegal union activity.[7] He did, however, argue for the first time in that court that the questions also called for answers which might develop that he was conspiring to conceal the books of the union and thereby to obstruct justice (Pet. 24). This ground for assertion of the privilege is therefore "pure afterthought" (*Rogers* v. *United States*, 340 U. S. 367, 371), which, not having been brought to the attention of the District Court, is not available

[7] In the Court of Appeals petitioner argued, as he does here, that the questions for which he was cited were rendered incriminatory by relation to other questions which he refused to answer but which were not the subject of his contempt citation. He also submitted, as part of his appendix, newspaper clippings relating to civil litigation over an election to the presidency of the Teamsters Joint Counsel between Martin J. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were mixed up with gangsters and racketeers, describing a so-called drive against city rackets by federal and local prosecutors, and naming one Johnny DioGuardia, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to pin down (R. 51–60). See the Statement, *supra*, pp. 11–12. One of the questions which petitioner had refused to answer but which was not included in his contempt citation had been (R. 84) "[d]id John DioGuardia order you not to come down or, rather, order you not to produce the books and records of Local 269." It was apparently petitioner's theory below that this and related questions rendered the other questions seeking to locate the books and records, for which he was cited, incriminatory since the content of these documents might reveal that he was personally involved in the union's activities.

to petitioner now. *United States* v. *Bryan*, 339 U. S. 323, 332–333.[8]

In any event, the argument as to possible obstruction of justice is not in essence different from the claim that the contents of the books could incriminate petitioner in the illegal affairs of the union. The contention is equally an attempt to give a personal character to a duty which is not personal but representative. If petitioner were in control of the union records at the time the subpoena was served on him, he was obligated, under *United States* v. *White*, *supra*, to produce them, and could not be excused because of their contents. Since this duty imposed on him as official custodian of the records was unqualified by the privilege, he certainly cannot bring himself within the protection of the privilege by violating his representative duty through a breach of the law. There would be even less reason to extend the privilege to such cases than in the instances where the claim is merely that the contents of the records would incriminate the custodian. As we have pointed out (*supra*, pp. 23–25), such a ruling would, in practical effect, immunize the organization's books and records from production.

[8] Petitioner stated to the grand jury that the books were not in his possession when he was questioned (R. 76); that they had not been in his possession three days preceding service of the subpoena on him (R. 77); and that he could not remember when he had last seen them (R. 84–85). There was thus no reasonable probability of direct incrimination in destruction of records after service of the subpoena, although conceivably there might be issues as to removal of the records in anticipation of a demand for their production.

5. Finally, it is appropriate to discuss the alternative to a holding that the privilege does not attach to questions concerning the location of organization books which have not been produced. That alternative is a conviction, not for failure to answer questions as to the books' whereabouts, but simply for failure to produce them. That could have been the procedure in this case. A prima facie case of criminal contempt would have been established by proof that (a) a valid subpoena duces tecum had been served on petitioner requiring him to produce books and records within his control, and (b) he failed to do so. *United States* v. *Bryan,* 339 U. S. 323, 330; *Lopiparo* v. *United States,* 216 F. 2d 87, 91–92 (C. A. 8), certiorari denied, 348 U. S. 916. The government would have had the right to rely on the presumption that the official custodian of the union's books had control over them at the time the subpoena was served, and the burden would have been on petitioner to explain the fact of nonproduction. *Lopiparo* v. *United States,* 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916; *London Guarantee and Accident Co.* v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Pa.). Petitioner could not have shielded himself behind the claim of privilege to refuse to explain the whereabouts of the books and still expect to escape the consequences that would flow from nonproduction coupled with the absence of explanation. *Lopiparo* v. *United States, supra;* see also *United States* v. *Patterson,* 219 F. 2d 659 (C. A. 2), where the district court denied the claim of privilege in proceedings for

contempt based on the failure to produce organization books pursuant to subpoena.[9]

We suggest that this is not a desirable substitute. The aim of an investigatory body, grand jury or other, is to get the books, not to put people in jail. It would be more in accord with the purpose of investigation to lay stress on the representative duty of the custodian to account for the books, rather than on punishment for his failure to produce. If a custodian who should normally have books does not produce them, he ought to be required to explain the nonproduction so that the grand jury may obtain them. It should not be necessary to put him in jail for nonproduction in order to force an explanation of the location of the records which as custodian it is his duty to have.[10]

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[9] In the *Patterson* case, the Court of Appeals held that, under the particular facts there shown, the government had failed to establish that the books were in existence at the time the subpoena was served. Patterson had already served a sentence for contempt for failing to produce books before the Internal Revenue Service. His prison term had interrupted his custody of the records. On these special facts, the Court of Appeals found that it could not be presumed that records known to exist in 1953 were still in existence and still in Patterson's control in October 1954.

[10] Once the books are produced or the nonproduction adequately explained, the official duty as a custodian does come to an end. Thereafter, questions to an individual may be subject to a claim of personal privilege. It is for that reason that the government, in its memorandum as to possible mootness in this case, agreed that now, with the books actually in the government's hands, the questions put to petitioner as to the whereabouts of the books would be in a different posture than they were at the time of the contempt proceeding. The questions as to what he had previously done with the books would now be personal as to him, since the books have been found and produced.

In short, recognizing as we must that the individual and the representative cannot be wholly separated, we submit that, as to unprivileged books which should be produced in a representative capacity, questions concerning the whereabouts of the books should be judged in relation to the representative duty. A custodian should be required to account for organization books which he has failed to produce.

B. The lower federal courts have held that the personal privilege of the custodian does not attach to questions concerning an organization's books.

Although the question has not been directly decided by this Court,[11] the lower federal courts have fairly consistently applied this Court's reasoning that organization books are not subject to a personal privilege to reach the conclusion that the personal privilege of the custodian does not attach to questions concerning the books.

The Courts of Appeals for the Second, Fourth, Sixth and Ninth Circuits have said generally that testimony auxiliary to the production of corporate books and records "is unprivileged as are the documents themselves." *United States* v. *Illinois Alcohol Co.*, 45 F. 2d 145, 149 (C. A. 2), certiorari denied, 282 U. S. 901; *Carolene Products Co.* v. *United States*, 140 F. 2d 61, 66–67 (C. A. 4), affirmed on other grounds,

[11] In *Rogers* v. *United States*, 340 U. S. 367, the Court upheld the contempt conviction of the treasurer of the Communist Party of Denver for refusal to answer questions as to the person to whom she had turned over Party books. See *supra*, p. 22. The decision was, however, based on the theory that the defendant had already waived her privilege by testifying as to her position in the Party. See also the discussion of *Heike* v. *United States*, 227 U. S. 131, *infra*, pp. 32–33.

323 U. S. 18; *Lumber Products Assn.* v. *United States*, 144 F. 2d 546, 553 (C. A. 9), reversed on other grounds, 330 U. S. 395; *Pulford* v. *United States*, 155 F. 2d 944, 947 (C. A. 6).

Judge Augustus Hand specifically held in *United States* v. *Lay Fish Co.*, 13 F. 2d 136 (S. D. N. Y.), that corporate officers were not entitled to statutory immunity from incriminating grand jury testimony as to the identity of corporate books and papers because such testimony was not subject to the personal privilege against self-incrimination (13 F. 2d at p. 137):

> * * * The corporations had to produce their books and papers in answer to subpoenas (Wilson v. United States, 221 U. S. 361, * * *), and the testimony amounted to no more than an identification of the books by a responsible officer. This was a step in obtaining the production of the books, was ex necessitate rei a matter of corporate record, accessible at least by subpoena to the government, and was no more a subject of personal immunity, because the disclosure might possibly injure the individual officers, than were the contents of the books, because they might have a like effect. Indeed, I can see little difference between testimony of the character given and a production of the books under a subpoena without it. * * *

Later, the Court of Appeals for the Second Circuit reached a similar conclusion in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233–234, *certiorari denied*, 279 U. S. 863, where the secretary-treasurer of a corporation who was charged with conspiracy to violate the National Prohibition Act, was called

to the stand and was compelled to identify the minutes of the corporation over his objection. In an opinion holding that such procedure was not improper, Judge Learned Hand said for the court (31 F. 2d at pp. 233-234):

> * * * That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. * * * Though they be in their very possession, even their property, it makes no difference; it is the semipublic character of the documents themselves which removes their inviolability, the fact that they record corporate transactions. However, the availability of the documents does not necessarily determine that of the testimony by which they may be authenticated. Conceivably it might be possible to force their production, and yet their possessor be protected from proving by his oath that they were what they purport to be. In some cases, as, for example, when they are authenticated by the corporate seal, this might be unnecessary, but usually something of the sort must appear.
>
> While, therefore, we do not disguise the fact that there is here a possible, if tenuous, distinction, we think that the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. In Heike v. U. S., 227 U. S. 131, * * * *it is true that the testimony* of the accused was *given upon a hearing in* a separate proceeding *inquiring into* a *different crime*, and the plea *in effect claimed immunity for any other crime*, in the proof of which the books produced might

become a necessary link. Nevertheless, it would seem that the testimony was privileged, since it did directly incriminate the witness, though in another matter, and that the immunity was necessary to avoid it. Unless that case is to be disposed of on the theory that no such immunity was claimed, it necessarily held that the privilege did not exist. *Hence it appears to us that the case determines that testimony auxiliary to the production is as unprivileged as are the documents themselves.* By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own. * * * [Emphasis added.] [12]

Subsequent to these opinions, the Second Circuit in *United States* v. *Field,* 193 F. 2d 92, 97, and 193 F. 2d 109, 111, certiorari denied, 342 U. S. 894, held that the trustees of a bail fund were properly held in contempt, not only for failure to produce records of the fund pursuant to subpoena, but for refusing to answer questions relating to the location and produc-

[12] In *Heike*, the defendant claimed immunity in respect to the use of certain incriminating testimony he had previously given before a grand jury investigating the activities of corporations of which he was secretary. He had been subpoenaed to bring the corporation records to the grand jury, and then had been asked detailed questions as to their contents. In holding that Heike was not entitled to personal immunity in respect to such testimony because it was not otherwise subject to the privilege, the Court of Appeals for the Second Circuit said (192 Fed. 83, 89), "But all this was merely a recital of what was disclosed by the books and papers of the corporation * * *. * * * Heike's so-called 'testimony' as to these subjects was but the preparation of an index to what they disclosed."

tion of such records. The court ruled that the custodian had no privilege as to such questions because, like questions relating to the identity of organization records, they were auxiliary to the production of the unprivileged records themselves. 193 F. 2d 92, 97. Although Judge Frank dissented as to other aspects of the majority opinion, he concurred in affirmance on the basis that (193 F. 2d at p. 102) "the defendants had no constitutional privilege either with reference to producing the Bail Fund's records or as to oral testimony concerning matters 'auxiliary to the production' of those records."

Here, no less than in *Field*, petitioner was the normal custodian of the records, and the person to whom an investigatory body would ordinarily look for their production. *Wilson* v. *United States*, 221 U. S. 361, 385; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916. He was therefore obligated either to produce them before the grand jury pursuant to the valid subpoena, or on default of their production to answer questions relating to their whereabouts. As we have shown, both duties were imposed on him, not in his personal but in his representative capacity, and therefore neither is subject to a personal claim of privilege.

II. Since the only issue before the District Court was the legal question of whether petitioner's personal privilege attached to questions concerning the whereabouts of the unproduced union books, the procedure followed was wholly adequate to accord him due process.

As stated at the outset, petitioner's contentions as to defects in procedure stem from a misunderstanding

of the government's position in relation to the fifteen questions concerning the whereabouts of the books, which are the only questions involved in this contempt proceeding. Those inquiries raised the one legal issue as to whether petitioner, as the union official normally charged with custody and the officer to whom investigatory bodies would normally look for production of its records, was required to account for their whereabouts. We do not deny in this Court that, if petitioner had a personal claim of privilege in regard to such questions, the possibility of incrimination existed under the rule of *Hoffman* v. *United States*, 341 U. S. 479. Hence, it was not necessary for petitioner to have the opportunity to make a more extended demonstration of possible incrimination. Neither a more extended hearing on the subject of possible incrimination, nor the production of the grand jury transcript, could have had any relevance to the legal issue before the court.

Petitioner had ample time to defend on that legal issue. He was not taken unaware by the court's ruling finding him in contempt on April 19, 1956, since the issue on which that finding was based had already been determined against him on April 17, two days before the court itself asked the questions and then cited petitioner for refusal in its presence to obey its direction to answer. Five days before that ruling, on April 12, petitioner had been warned that his refusal to answer would constitute a contempt of court, and his attorneys, who were present in the anteroom at the time, had adequate time to marshal their arguments on what was a pure issue of law.

The record shows that petitioner's counsel was given extensive opportunity on each occasion to demonstrate some theory justifying an extension of petitioner's personal privilege to the questions asked, but each time failed to do so. Therefore, when petitioner refused, in the court's presence, to comply with its ruling that he was required to answer questions relating to the union's books, his summary conviction for contempt was entirely proper under Rule 42 (a), F. R. Crim. P. (*supra*, p. 3). *Carlson* v. *United States*, 209 F. 2d 209, 216 (C. A. 1).

There was not in this case, as in *Carlson*, any factual issue as to the validity of the claim of privilege, but merely the legal issue as to whether the privilege applied at all. Also, unlike *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2), the *other* questions put to petitioner before the grand jury could have had no bearing on any issue with respect to the fifteen questions involved in the contempt proceeding. Rather, as we have pointed out, the selection of only the fifteen questions bearing on the location of the books was an acceptance, in effect, of the validity of petitioner's personal claim of privilege as to the other questions put to him as an individual. There was a careful distinction between petitioner's rights as an individual and his duty as custodian of the union records.

Thus, it is plain that the court had before it a question of law as to which no more was necessary than the legal argument which was had. When petitioner refused to accept the court's ruling on that question, but chose rather to defy it, his deliberate refusal in the presence of the court to obey an order of the court

was subject to immediate punishment under Rule 42 (a). From this defiance, there resulted the final judgment of conviction which enabled petitioner to raise the issue of law on appeal. Had petitioner as custodian of union records merely refused to produce them on the ground of privilege as in *United States* v. *White*, 322 U. S. 694, it is clear that even the most graphic demonstration of incrimination would not have excused the nonproduction of the records. The same rule obtains in the instant case; the possibility of incrimination would not, in our view, alter his unqualified obligation as a union officer to answer the questions pertaining to the location of the union books.

The same procedure was followed in *Rogers* v. *United States*, 340 U. S. 367, where the issue turned on a question of law (whether the petitioner had a right to claim the privilege in the face of prior admissions) rather than on the resolution of facts as to whether the question was incriminating. See Brief for Petitioner, Nos. 20, 21, 22, O. T. 1950, pp. 54–58, and Brief for the United States, Nos. 20, 21, 22, O. T. 1950, pp. 51–53. The Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling the contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue of due process (Petition for Rehearing, No. 20, O. T. 1950, pp. 6–10) was denied.

We stress that we do not suggest any restrictions on the right of a witness, who is entitled to the privilege providing he can show the requisite danger

of incrimination, to make such a factual showing appropriate to the circumstances of his case; but that was not the issue in this proceeding. No factual issue was involved. The only issue was and is whether petitioner, as custodian, had a privilege with respect to questions concerning union books. That problem was fully presented below and is properly before this Court now. Neither the production of the grand jury transcript in the first instance, nor a more extensive or formal hearing into the possibility of incrimination, could have any bearing on that question which is the only one here for decision.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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